Nos. 20261 and 20262

United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE HANN, et al,

Appellants,

v.

J. J. NAYLOR,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

SANDERS, LIVELY & CAMAROT
655 North "A" Street
Springfield, Oregon 97477
Attorneys for Appellee

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STATEMENT OF JURISDICTION

The Appellee accepts and adopts the Statement of Jurisdiction of the Appellant.

The Appellee does not entirely accept the Appellant's Statement of the Case, and accordingly, makes this additional

STATEMENT OF THE CASE

Mr. Naylor, the Appellee, at no time had the occasion to enter into any collective bargaining or other agreement with the Appellants, the Carpenter's Union, or any other person representing the Carpenter's Union (TR 22). He had never been extended any offer to enter into any such agreements (TR 23); and at no time had he ever even discussed an agreement with any such persons or entities (TR 23).

With respect to the forms (Plaintiff's Exhibit 1) on which Appellants entirely rely in support of their claim for recovery, Appellee explained the circumstances under which these forms were transmitted (TR 24). More specifically, Mr. Naylor testified that in January of 1960, he telephoned the Carpenter's Hall in Eugene, Oregon, to secure union carpenters, at which time he talked to a man by the name of "Sam", who Mr. Naylor thought was a "secretary of the Union". (TR 29). During the conversa-

tion, mention was apparently made that he would have to contribute to a health and welfare fund, and that forms would be sent him, which would require his filling out Social Security numbers, and the names and amount of hours worked by the men (TR 24). The forms sent him were captioned "Employer Remittance Reports", and thereafter he filled them out monthly for some two and a half years. At no time did Mr. Naylor regard these reporting forms as constituting any kind of an agreement (TR 25). At no time did he recall ever receiving a copy of any Trust Agreement, or of any Pension Plan (TR 25), or of any Collective Bargaining Agreement between any Employer's Association and the Carpenter's Union (TR 25). Mr. Naylor also testified that he was not a member of any association which had been a signatory under any Collective Bargaining Agreement; nor had he authorized any person to sign any such agreements on his behalf (TR 26).

Mr. Naylor also testified that he had an 8th grade education and at the pertinent time herein did his own administrative work, in that he did not have any such personnel, or even a secretary (TR 26).

The Appellee made it clear that he had not read that portion of the small print appearing in the "Employer's Remittance Reports" (TR 27).

The only other communication between Mr. Naylor and any other person, even remotely affiliated with Appellants, from January, 1960 until October, 1963, (when the Ap-

pellants requested they be permitted to do an audit) was when Appellee requested additional "reporting forms", which Appellants sent him (TR 29).

Mr. Naylor testified that after he ceased making contributions he paid the difference directly to his employees (TR 30, 31). He explained that he felt an obligation to do this because this was what it had been costing him per hour for the men and that "they were worth it" (TR 31); it was simply a transfer of the 20c an hour from the Fund to the men (TR 32). The men also wanted it this way, otherwise it was their intention to quit (TR 33, 34). Subsequent to the time he discontinued paying moneys to the Fund, his carpenters discontinued Union membership (TR 32, 33). The first time he was told that he was under an alleged continuing obligation to pay moneys into the Fund was when his books were audited in the latter part of 1963 (TR 34).

The record is unclear as to whether or not claims made by Mr. Naylor's employees were made on account of the contributions of their previous employers (TR 15), or because of contributions made by Appellee, in that Appellants' witness clearly testified (in answer to a question by the Court) that such claims could have been based on their employment with other employers (TR 15, 16). Further, the evidence indicates claims were filed by six employees prior to June of 1962, but it does not indicate such claims were ever paid as contended by appellants. (See page 6 and 10 of Appellants' Brief and their citations to the transcript).

Erie R. Co. v. Tompkins, 304 U.S. 64; 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938)

3. It is basic law in Oregon that an offer and acceptance are necessary to constitute a contract. Furthermore, the parties must have a distinct intention as to what their agreement is.

(a) *In Klimek v. Perisich,* 231 Or. 71, 371 P2d 956, (1962), The Oregon Supreme Court, citing numerous cases and authorities, reaffirmed the following principles of contract law:

1) "The intention of the parties to enter into a contract and the construction of their language to express their intentions and agreement must be construed in the light of the circumstances which then existed." (Pg. 78, id), see also Or. Rev. Stat., Sec. 42.220.

2) "An offer must be certain so that upon a non-qualified acceptance the nature and extent of the obligations of each party are fixed and may be determined with reasonable certainty." (Pg. 79, id).

3) "It is well settled that when a contract is to be found on an offer and acceptance, it must be shown that the latter coincides with the former. And unless this appears there is no agreement." (Pg. 79, id).

4) "In other words, there must be a meeting of the minds as to the obligations each assumes under the contract before it can be said that a contract exists." (Pg. 79, id.)

(b) "Before there can be a valid contract the parties must have a distinct intention, common to both and without doubt or difference, so that there is a meeting of the minds as to all terms, and if any portion of the proposed terms is not settled or no mode is agreed on by which it may be settled, there is no agreement."

Reed et al v. Montgomery, 180 Or. 196, 220; 175 P2d 986, 1006 (1947).

In support of this holding, the Court cited:

1) Williston on Contracts, Rev. Ed. Sec. 45;
2) 12 Am. Jur. *Contracts,* Sections 23 & 24, P. 519;
3) 17 C.J.S. *Contracts,* Sections 31 and 49, pp. 359, 394;
4) Restatement of the Law, *Contracts,* Sec. 32;
5) Numerous Oregon cases.

(c) If from a promise or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed, knows or has reason to know that the person making it did not intend it as an expression of a fixed purpose, until he has given a further expression of assent, he has not made an offer.

1) *Metropolitan Life Insurance Co. v. Kimball,* 163 Or. 31, 94 P2d 1101, (1939)

(d) Extrinsic writings referred to in any alleged agreement must be connected thereto by specific reference, or by such mutual knowledge and understanding that reference by implication is clear.

1) *Newton v. Smith Motors, Inc.,* 122 Vt. 409, 175 A2d 514 (1961)

4. "The rule seems to be firmly established that printed conditions of letter or bill heads, or order blanks of the proposer not specially referred to or called to the attention of the other party to the contract, will not be regarded as a part thereof."

May Hosiery Mills v. Hall & Son, 77 Cal. App. 291, 246 Pac. 332 (1926).

Compare *Arthur Phillip Export Co. v. Leatherstone, Inc.,* 275 App. Div. 102, 87 NYS2d 665 (1949).

I Williston, *Contracts,* Sec. 90D, p. 312.

5. There is a definite distinction to be made between a man signing what he knows to be a contract and not reading what he is signing, and the situation where a man signs a form he justifiably believes to be something other than a contract and not reading it in its entirety.

Capital Automatic Music Co., Inc. v. Jones, 114 NYS2d 185 (1952).

Grantell v. Friedman, 197 NYS2d 605 (1959).

Borden v. Day, 197 Okla. 110, 168 P2d 646 (1946).

1 Williston, *Contracts,* 3rd Ed., Sec. 95A, p. 350.

17 CJS *Contracts,* Sec. 137, p. 880.

17 Am. Jur. 2d, *Contracts,* Sec. 149, p. 499.

ARGUMENT IN DETAIL

The evidence reflects the Appellee to be man of limited education, who, as a small contractor, sought to secure carpenters by telephoning the Union Hall (Tr 24, 26, 29). Apparently during the course of his conversation with a "Sam", whom Mr. Naylor believed to be a Union secretary, he learned for the first time that Health and Welfare payments were required to be paid into a Trust Fund or Funds (Tr 24, 25). The conversation with "Sam" was quite limited and nothing was discussed insofar as entering into an agreement or contract with any trustees, or any other person or entities (Tr 24, 29, 30). The only conversation even obliquely touching on the present matter, other than Mr. Naylor having to make some fund payments, was that he would have to fill out forms which would be sent him (Tr 29). The "forms" turned out to be the "Employer Remittance Report" (Plaintiff's Exhibit 1). From a cursory examination of these forms, it is understandable why neither "Sam" nor the Appellee would have thought them-

selves to be entering into a contract, for the "forms", obviously were designed primarily, if not totally, for the submission of certain information. Instructions are set forth therein on how such reports are to be filled out and considerable space is provided in which to furnish said information, with a concluding line for the Employer's signature. It was the Appellee's unequivocal testimony that he did not recall reading the small print immediately above this line (TR 27); that after he filled out a form he merely signed it. The clear inference is that he was simply completing a report and signing his name thereto, believing that he was merely verifying the hand-written data he had submitted for the month.

Under the immediate circumstances, it cannot be deemed unreasonable, or even negligence, for Appellee to have signed these reports without having read the small print.

Mr. Naylor's subsequent actions are consistent with his denial of ever having submitted himself to any trust agreements - agreements arbitrated and negotiated by professional representatives, which contain complex terms and imposing conditions, duties, and responsibilities. After he discontinued contributing to the fund, Appellee did not pocket the moneys he had been contributing monthly, but instead he paid it to his employees (TR 31). In other words, he paid the same amount per hour for employees, after discontinuing the monthly contributions, as he had before; had he mutually assented to an "agreement" he certainly would not have paid his employees moneys which he would

also have been under an obligation to pay to any Fund.

If Appellants are offended at the lack of Appellee's business acumen in failing to read the small print, or to realize some attempt was being made to have him bind himself to an agreement, they should examine their own conduct in this instance. Notwithstanding numerous full time administrative personnel in the Trustee Bank, a C.P.A. auditor and two large law firms which apparently represent the Appellants, there is no testimony or evidence that Appellants or anyone on their behalf ever contacted the Appellee to discuss any agreement or agreements, or that they caused to be transmitted to Appellee copies of such agreements, or that there was an acknowledgment of an agreement, mutually binding or otherwise. Apparently, from January of 1960, when Mr. Naylor first called the Carpenter's Hall, until sometime late 1963, no mention was ever made of the existence of any agreement.

Whether an agreement had been entered into is a question of fact. *Lewis v. Mears,* supra; *Valley Group Pipe Trades Trust Fund v. Strain Plumbing & Heating Co.,* supra.

There is no indication of an offer, much less an acceptance, having taken place in this instance, nor can there be a showing, whether subjectively or objectively, that there was any manifestation of intent by either party in this cause to enter into an agreement. *Klimek v. Perisich,* supra. There is nothing to even suggest that either "Sam",

the secretary, or the Appellee, knew that they were negotiating a contract.

In the *Klimek* case, the Supreme Court of the State of Oregon found that the plaintiff had failed to prove a sufficiently definite agreement had been made. There, plaintiff offered to let defendant remodel a house for him, but plaintiff did not show the offer was specific enough. In arriving at its decision, the Oregon Court recognized the rules of contract law that apply with equal force in this appeal.

The circumstances have been clearly explained as to what occurred and it is obvious that Mr. Naylor was totally unaware that any agreement was being entered into. *Capital Automatic Music Co., Inc. v. Jones,* supra. In *Capital Automatic* the New York Court found defendant was not bound by the small print on the back of a document, which he was led to believe was a receipt that was actually a contract. The following is taken from that opinion at p. 188:

> "Where there is a mistake as to the *character* of the instrument which relates to its *existence* as a contract or legally operative document of any kind, there is no *mutual assent*. In such a case, negligence is a very slight factor, since the average reasonable man would not be expected to exercise that caution which he would if he knew that he was signing what purported to be a receipt but in reality was a contract, particularly if he intended to become a party thereto. (Citations omitted). And if such a mistake occurs, whether induced by fraud or *without it*, no contract is formed." (Citations omitted) (Emphasis in original)

This principle illustrates Appellee's position. He justifi-

ably and reasonably was of the belief that the "Employers Remittance Report" was an information submittal and not a contract.

Appellants do not seem to appreciate the distinction between signing a document knowing it to be an agreement and failing to read the contents therein, from the case at hand, wherein the party signed a printed form under the initial and continuing belief that it was simply a method of reporting information, rather than executing an agreement. *Lewis v. Mears,* supra; *Valley Group Pipe Trades Trust Fund v. Strain Plumbing & Heating,* supra; *Klimek v. Perisich,* supra; *Capital Automatic Music Co., Inc. v. Jones,* supra.

Appellants rely heavily on *Lewis v. Cable,* 107 F. Supp. 196 (D.C.W.D. Pa., 1952), discussed on pages 12 to 14 of their Brief. But that case is distinguishable in that the decision rests on the defendant-employer being estopped to deny his employer association's authority to bind him to such an obligation. In the instant appeal, Appellee was not a member of an employer association and the elements of estoppel are not present. Furthermore, in the *Cable* case the employer acknowledged the existence of a contract from the outset.

Lewis v. Gilchrist, 198 F. Supp. 239 (D.C. N.D. Ala., 1961), discussed by Appellants on pages 14 and 15 of their Brief, involves a situation where defendant-employer was trying to avoid a collective bargaining contract on the

ground of duress. The court there found the agreement not to be a sham and that duress did not exist. The defenses interposed went to *avoiding* an existing contract, and were *not* defenses that went to show that no contract was ever made. For these reasons, the *Gilchrist* case would not control the decision in this case.

ARGUMENT II

UNDER RULE 52(a) OF THE FRCP, FINDINGS OF FACT BY A TRIAL COURT SHALL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

POINTS AND AUTHORITIES

Findings of fact by a trial court shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to adjudge the credibility of the witnesses.

Rule 52 (a) Federal Rules of Civil Procedure.

Axelbank v. Rony, 277 F2d 314, (9th Cir. 1960).

Frank v. International Canadian Corp., 308 F2d 520 (9th Cir., 1962).

Amerial Contact Plate Freezers, Inc. v. Belt-Ice Corp., 316 F2d 459 (9th Cir., 1963).

ARGUMENT IN DETAIL

Appellants are correct in arguing subjective intent was not the issue to be decided in the trial court; but they are incorrect in concluding that this is the basis on which the trial court found no contract or agreement had been entered into. As noted above, the true issue is whether or not the parties, *in fact,* entered into a contract or an agreement.

When the circumstances surrounding the signing of the Employer Remittance forms are reviewed, it is obvious that the trial court had to consider and determine whether or not the elements necessary to the formation of a contract, particularly mutual assent, had taken place. The factual finding in this regard was that it had not, and there is an abundance of evidence to substantiate this determination. (See "Statement of the Case" herein, pp. 1-3, supra.)

The Appellants, in essence, are arguing for a trial de novo at the appellate level. But, under Rule 52 (a) of the Federal Rules of Civil Procedure, findings made by a Judge of the United States District Court "shall not be set aside unless clearly erroneous * * *". Even if an appellate court might have concluded differently in the first instance, than did the trial judge, the Federal Rules do not empower it to sustitute its own views for those of the fact finding tribunal. *Axelbank v. Rony,* supra; *Frank v. International Canadian Corp.,* supra; and *Amerial Contact Plate Freezers, Inc. v. Belt-Ice Corp.,* supra.

CONCLUSION

Appellee contends the Trial Court committed no error in dismissing Appellants' cause as the Appellee never bound himself contractually to make payments to the Trust Fund. Accordingly, the judgment of the Trial Court should be affirmed.

Respectfully submitted,
SANDERS, LIVELY & CAMAROT

By Henry J. Camarot
HENRY J. CAMAROT
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Henry J. Camar
of Attorneys for Appellee